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The Comparative Negligence Defense in Pennsylvania Dram Shop Suits: Personal Responsibility for All Patrons

I. Introduction

Pennsylvania has not traditionally recognized the defense of contributory negligence in dram shop suits. Taverns which serve a patron in violation of the Liquor Code[1] and are sued for subsequent injuries to the patron or a third party cannot have their liability apportioned, despite the negligent acts of the patron. Generally, if a plaintiff establishes that a tavern violated the Liquor Code, the tavern is deemed negligent per se and is held fully liable for any alcohol-related injuries.

With regard to minor-patrons, however, an exception has been carved out which allows the defense of comparative negligence to be raised in some instances to apportion fault between the tavern and the minor patron. When a tavern violates the Liquor Code by serving a minor, the tavern is deemed negligent per se and is liable for injuries sustained by the minor's consumption.[2] The tavern may, however, assert the negligence of the minor as a defense and liability may be reduced accordingly.[3] Serving a *visibly intoxicated* customer, also a violation of the Liquor Code, is also deemed to be negligence per se,[4] but the defense of comparative negligence is not available in this case.[5]

This Comment will trace the development of licensee civil liability and the availability of the comparative negligence defense to licensees in Pennsylvania. Furthermore, this Comment will demonstrate that the defense of comparative negligence should be available to taverns whose negligence per se derives from the service of alcohol to visibly intoxicated customers. Judicial integrity and social policy necessitate this change. Comparative negligence equitably apportions responsibility and fault between culpable parties. By denying taverns this defense, they suffer a disproportionate degree of liability in dram shop suits.[6] The

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1. PA. STAT. ANN. tit. 47, §§ 1-101 to 8-803 (1969 & Supp. 1993).
2. *See infra* notes 38-64 and accompanying text.
3. *See infra* notes 65-81 and accompanying text.
4. *See infra* notes 7-24 and accompanying text.
5. *See infra* notes 25-37 and accompanying text.
6. Comparative negligence was adopted by the Pennsylvania General Assembly in 1976. Act of July 9, 1976, No. 152, 1976 Pa. Laws 855 (codified as amended at 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1993). For the text of this act and a discussion of the relevance of this change from contributory to comparative negligence see *infra* notes 67, 78.

Pennsylvania courts perceived the wisdom and fairness in allowing taverns the defense of comparative negligence in suits involving the service of alcohol to minors. Accordingly, Pennsylvania courts should extend this logic and allow taverns to use the defense of comparative negligence for suits involving the service of alcohol to visibly intoxicated adults.

II. Historical Background

A. The Finding Of Civil Liability

The Pennsylvania legislature enacted the Liquor Code, or Dram Shop Act, in 1951.[7] The Liquor Code regulates and licenses the distribution of intoxicating liquors by commercial vendors.[8] It also establishes criminal liability and provides criminal penalties for its violation.[9] Criminal liability stems from service of alcohol to certain groups of individuals. In section 4-493 the act specifies five groups to whom the sale of intoxicants is unlawful. Among these are minors and visibly intoxicated customers.[10]

In Pennsylvania a violation of the Liquor Code can give rise to civil[11] as well as criminal liability.[12] The courts have determined that a violation of the Liquor Code is negligence per se.[13] Injured plaintiffs need only prove that the licensee violated the act and that as a result of this violation, they were injured.[14]

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7. Act of April 12, 1951, No. 21, 1951-52 Pa. Laws 90 (codified as amended at PA. STAT. ANN. tit. 47, §§ 1-101 to 8-803 (1969 and Supp. 1993).

8. PA. STAT. ANN. tit. 47, §§ 4-401 to 4-499 (1969 & Supp. 1993).

9. These include fines, imprisonment and suspension or revocation of a liquor license. PA. STAT. ANN. tit. 47, § 4-494.

10. PA. STAT. ANN. tit. 47, § 4-493 (Supp. 1993), states in pertinent part:

> (1) For any licensee or the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, *to any person visibly intoxicated*, or to any insane person, *or to any minor*, or to habitual drunkards, or persons of known intemperate habits.

(emphasis supplied).

11. This finding of civil liability was a departure from the traditional common law view where it was not a tort to provide liquor to "able bodied" persons. Traditionally, it was thought that the consumption of alcohol was the cause of any subsequent injury. *See* Herr v. Booten, 580 A.2d 1115, 1118 (Pa. Super. Ct. 1990); 48A C.J.S. *Intoxicating Liquors* § 428, at 133-36 (1981); 45 AM. JUR. 2d *Intoxicating Liquors* § 553, at 852-53 (1969).

12. PA. STAT. ANN. tit. 47, § 4-494 (Supp. 1993).

13. For a discussion on negligence per se see W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 36, at 227 (5th. ed. 1984).

14. *See, e.g.*, Smith v. Evans, 219 A.2d 310, 311 (Pa. 1966); Majors v. Brodhead Hotel, 205 A.2d 873, 875-76 (Pa. 1965); Smith v. Clark, 190 A.2d 441, 442 (Pa. 1963) (violation of § 4-

Examples of Pennsylvania courts finding taverns liable for violations of the Liquor Code include *Majors v. Brodhead Hotel*[15] and *Smith v. Evans*.[16] In *Majors*, a man became "exceedingly" drunk at a party in a hotel.[17] In an attempt to keep him from causing problems with the other guests, hotel staff placed him in the bathroom.[18] The man then crawled out of the bathroom window and proceeded to walk around on the roof. The man fell off the roof and sustained injuries.[19] He then sued the hotel under the theory of negligence per se. The complaint alleged that the hotel had violated section 4-493(1) of the Liquor Code by serving a visibly intoxicated person.[20] The trial court found the hotel liable and the Supreme Court affirmed on appeal.[21] The court recounted that serving a person who is visibly intoxicated is negligence per se. In the event that the violation is a proximate cause of the injury to the intoxicated person, or another, the licensee is liable.[22]

In *Evans*, the Pennsylvania Supreme Court concluded that a commercial licensee could be held liable for damages proximately caused by serving alcohol to a visibly intoxicated minor in violation of the Liquor Code.[23] The court stated that in serving such a person, the tavern violated the law. If the intoxication was a proximate cause of the resultant injuries, then the tavern is liable in tort.[24]

493(1) by service of alcohol to an intoxicated minor constituted two separate violations, both constituting negligence per se); Peluso v. Walter, 483 A.2d 905 (Pa. Super. Ct. 1984) (the service of alcohol to a visibly intoxicated customer is negligence per se, bringing absolute liability to the tavern for injuries proximately resulting and the testimony of the tavern owner stating that the customer was not visibly intoxicated at the time of sale is not enough to support the tavern owner's motion for summary judgment); Couts v. Ghion, 421 A.2d. 1184 (Pa. Super. Ct. 1980) (licensed restaurant could be held liable for injuries sustained by third party proximately resulting from the unlawful sale of alcoholic beverages to a visibly intoxicated patron); Connelly v. Ziegler, 380 A.2d 902 (Pa. Super. Ct. 1977) (the service of intoxicants to a visibly intoxicated patron is a violation of § 4-493(1) and therefore constitutes negligence per se, and a licensee is liable for the death of a patron who fell down stairs as a result of the intoxication); Stewart v. Sutliff, 3 Pa. D. & C.4th 613 (1989) (in applying *Connelly*, 380 A.2d 902, and *Evans*, 219 A.2d 310, the court stated that a tavern keeper is liable in tort for violating the law by serving someone who is visibly intoxicated if as a result of the intoxication the consumer injures themself or someone else. This duty is limited to the person that is served the alcohol and anyone whom that person may injure. This duty did not extend to the motorist who struck the walking intoxicated patron.).

15. 205 A.2d 873 (Pa. 1965).
16. 219 A.2d 310 (Pa. 1966).
17. *Majors*, 205 A.2d at 875.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Majors*, 205 A.2d at 878.
22. *Id.* at 875-76.
23. *Evans*, 219 A.2d at 311.
24. *Id.* The court went on to state that the fact that the patron was a minor was not enough

Violation of the Liquor Code has, then, been deemed to give rise to civil liability. This liability is absolute in that a licensee who is found to have violated the Liquor Code will be found liable upon a showing of causation. Along with a finding of absolute liability, the courts have denied taverns the defense of contributory negligence.

B. Contributory Negligence Implications

Relying on section 483 of the Restatement (Second) of Torts, the *Majors* court denied Brodhead Hotel the opportunity to assert the defense of contributory negligence.[25] The defendant hotel argued that the trial court should have instructed the jury on the theory of contributory negligence.[26] The Pennsylvania Supreme Court disagreed with the defendant and held that the lower court did not err in refusing this instruction.[27] The Supreme Court followed an earlier Superior Court decision in *Schelin v. Goldberg*[28] and applied the Restatement (Second) of Torts section 483.[29] Section 483 states that statutes enacted to protect a specific class of persons from their inability to exercise self-protective care are to be treated differently in regard to available defenses to the defendant.[30] When one of these "exceptional statutes"

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to establish liability. *Id.* Because of the passage of section 4-497, proof of intoxication at the time of sale was required to find civil liability. *Id.* For discussion on licensee's liability for service to minor's see *infra* notes 38-64 and accompanying text.

25. *Majors*, 205 A.2d at 876. For the text and discussion of the court's application of the RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965), see *infra* notes 29-31 and accompanying text.

26. *Majors*, 205 A.2d at 876.

27. *Id.*

28. 146 A.2d 648 (Pa. Super. Ct. 1958). In *Schelin*, the court held that section 483 of the Restatement (Second) of Torts should apply in Liquor Code suits. The defendant in *Majors* attempted to distinguish the two cases by the fact that in *Schelin* the patron had arrived at the defendant's bar already intoxicated while in *Majors* the Plaintiff became intoxicated while at the hotel. *Majors*, 205 A.2d at 876. The court dismissed this as a distinction without a difference. *Id.*

29. Section 483, *Defense to Violation of Statute*, states:

> The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.

RESTATEMENT (SECOND) OF TORTS § 483 (1965).

30. Thus, the court implicitly applied comment c. to section 483 which provides in pertinent part:

> There are, however, *exceptional statutes* which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves. Thus a statute which prohibits the sale of firearms to minors may be clearly intended, among other purposes, to protect them against their own inexperience, lack of judgment, and tendency toward negligence, and to make the seller solely responsible for any harm to them resulting from

is implemented in a civil suit, a member of the special class is not barred from recovery by their contributory negligence.[31] The court determined that the legislature enacted section 4-493(1) to protect people when they are visibly intoxicated.[32] Since the plaintiff, Majors, was visibly intoxicated when the hotel served him, the hotel was liable for the injuries plaintiff received as a proximate result of his intoxication.[33]

Recently, a Pennsylvania trial court followed *Majors* and *Schelin* and ruled that the defense of contributory negligence is unavailable to licensees sued under the theory of negligence per se. In *Neal v. Sunset Grove, Inc.*,[34] the court sustained the plaintiff's preliminary objections to the defendant's use of the contributory negligence[35] defense.[36] Relying on the holdings in *Majors* and *Schelin*, the court concluded that the plaintiff was not barred from recovery for injuries sustained as a result of the defendant's violation of the Liquor Code. The plaintiff's own negligence was deemed irrelevant.[37]

Taverns in violation of the Liquor Code have been deemed to be strictly liable to persons injured. They were prevented from asserting the negligence of the patron to whom they served alcohol in violation of the Liquor Code. These rules changed in regard to minors, however, when the liability for service to minors in violation of the Liquor Code changed.

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the sale. In such a case the purpose of the statute would be defeated if the contributory negligence of the minor were permitted to bar his [or her] recovery.

RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965) (emphasis supplied).

31. RESTATEMENT (SECOND) OF TORTS § 483 (1965). *See also Majors*, 205 A.2d at 876.

32. *Majors*, 205 A.2d at 876. For discussion of the appropriateness of the court's placing intoxicated people into the class of people the legislature intended to be protected from themselves by § 4-493(1), see *infra* notes 141-151 and accompanying text.

33. *Majors*, 205 A.2d at 877-78.

34. 1 Pa. D. & C.4th 294 (1988). In *Neal*, the plaintiffs filed a complaint alleging that the defendant's employee served the plaintiff while he was visibly intoxicated and that the plaintiff was involved in a serious accident as a result of his intoxication. *Id.* at 295.

35. The *Neal* court used the term contributory negligence but the case was commenced well after the adoption of comparative negligence in Pennsylvania in 1976. Other cases have applied comparative negligence and used the term contributory negligence. *See, e.g.*, Congini by Congini v. Porterville Valve Co. 470 A.2d 515 (Pa. 1983). For a discussion on the distinction between contributory negligence and comparative negligence *see infra* notes 67 and 78. For this distinction's relevance to this Comment *see infra* notes 110-140 and accompanying text.

36. *Neal*, 1 Pa. D. & C.4th at 296-97. Under its new matter, the defendant also raised the defense of assumption of the risk. *Id.* at 297. The court sustained plaintiff's preliminary objection to this defense also, stating that a violation of section 4-493(1) is negligence per se, making defendant liable for injuries proximately caused by the violation. *Id.* at 297-99 (citing *Connelly v. Ziegler*, 380 A.2d 902 (Pa. Super. Ct. 1977)). The court also applied the Restatement (Second) of Torts section 496F which is considered to be analogous to section 483 regarding contributory negligence. *Id.* at 298.

37. *Id.* at 296.

C. *The Change For Service To Minors*

Licensee civil liability for the service of alcohol to minors changed in 1965,[38] when the Pennsylvania legislature added section 4-497[39] to the Liquor Code.[40] Section 4-497 provides that no licensee shall be liable to a third person[41] for damages sustained by a patron unless said patron was visibly intoxicated at the time of the sale.[42] The addition of section 4-497 seemed to indicate that a tavern could not be held liable for serving alcohol to an unintoxicated minor.[43] Under the statute, a tavern could be held liable only for serving a visibly intoxicated person.[44]

In *Matthews v. Konieczny*[45] the Pennsylvania Supreme Court went beyond the rule set forth in the statute and held that as a matter of common law commercial licensees can be held liable for serving an unintoxicated minor.[46] The *Matthews* court was presented with two

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38. Jane Leopold-Leventhal, *Pennsylvania Broadens Commercial Licensee Liquor Liability for the Service of Alcoholic Beverages to Minors--Matthews v. Konieczny*, 61 TEMP. LAW REV. 643, 652 (1988).

39. Section 4-497 states:

> No licensee shall be liable to third persons on account of damages inflicted upon them off the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

PA. STAT. ANN. tit. 47, § 4-497 (Supp. 1993).

40. Statutes of this type have been characterized as "anti-dramshop" acts. These acts seek to exempt vendors from civil liability except under narrow circumstances. Julius F. Lang, Jr. & John J. McGrath, Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1130-34 (1983-84). This can be seen as evidence of an interest in the legislature not to constrain business relations. Many times these statutes are reactions to the acts which were passed in an attempt to deter drunk driving.

41. This section applies only to situations where a third party is injured by a customer of the defendant. *See* Simon v. Shirley, 409 A.2d 1365, 1366 n.5 (Pa. Super. Ct. 1979) (distinguishing Connelly v. Ziegler, 380 A.2d 902 (Pa. Super. Ct. 1977), on grounds that plaintiff in *Connelly* was a customer of the defendant licensee as opposed to a third party).

42. PA. STAT. ANN. tit. 47, § 4-497 (Supp. 1993).

43. *Compare* PA. STAT. ANN. tit. 47, § 4-497 (Supp. 1993) (which makes no mention of minors), *with* PA. STAT. ANN. tit. 47, § 4-493 (Supp. 1993) (which includes minors).

44. *Compare* Smith v. Evans, 219 A.2d 310 (Pa. 1966) *with* Smith v. Clark, 190 A.2d 441 (Pa. 1963). In *Clark*, the court found negligence per se in the service of alcohol to a minor, while in *Evans* (decided after the adoption of section 4-497) the court specifically stated that the service of alcohol to a minor was not enough to establish liability. *Evans*, 219 A.2d at 311. The plaintiff must prove that the purchaser was intoxicated at the time of purchase regardless of the patron's age. *See id. See also Shirley*, 409 A.2d at 1366-67 (commercial vendor's service of alcohol to an unintoxicated minor absolves the vender of liability for damages resulting from minor's subsequent intoxication); Peluso v. Walter, 483 A.2d 905, 907 (Pa. Super. Ct. 1984); Speicher v. Reda, 434 A.2d 183, 185-86 (Pa. Super. Ct. 1981).

45. 527 A.2d 508 (Pa. 1987).

46. *Id.* at 510. For an evaluation of this change and the court's reasoning see Leopold-Leventhal *supra* note 38, at 649. The author argues that the finding of liability for a licensee who

cases in which a licensee had served a minor.[47] In neither case did the complaint allege that the minor was visibly intoxicated at the time they purchased the beer. In both cases the lower court had granted the defendant's motion for summary judgment and the Superior Court had affirmed.[48]

The Supreme Court in *Matthews* overturned the lower courts and determined that a minor, as one who cannot legally purchase alcohol, is not a "customer" within the meaning of section 4-497 of the Liquor Code.[49] Therefore, a licensee is not absolved from liability under section 4-497 of the Liquor Code for serving an unintoxicated minor. The court stated that it was not the intent of the legislature to absolve licensees from liability when they provide alcohol to a minor.[50] The violation of the licensee arises out of the Liquor Code and the Crimes Code,[51] and the violating licensee is therefore negligent per se.[52]

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has served an unintoxicated minor is incorrect. The author argues that the court goes against the clear legislative intent of section 4-497 in expanding social host liability to commercial vendors. According to the author, section 4-497 was enacted to absolve licensees from liability except in cases where the licensee served a visibly intoxicated adult. Furthermore, the author asserts, the finding of liability through the Crimes Code amounts to "manipulative statutory interpretation" and "judicial activism" which violates the proper role of the courts. The author concludes that although there may be social considerations which support the finding in *Matthews*, it is for the legislature and not the judiciary to make decisions. *Id.*

An evaluation of the correctness of the decision in *Matthews* is beyond the scope of this comment.

47. In one case a group of minors had pooled their money and one minor had purchased a case of beer from the defendant. *Matthews*, 527 A.2d at 510. After driving around while consuming the beer the youths were involved in an accident in which one of the minors died. This minor's estate sued, among others, the beer distributor who had sold the beer. *Id.*

In the other case, a minor had purchased beer from a distributor. *Id.* A second minor had consumed some of this beer and had been subsequently involved in an accident. *Matthews*, 527 A.2d at 510. The minor was found to be legally intoxicated at the scene of the accident. *Id.* The plaintiff, who had been injured in the accident, sued several defendants including the distributor for its sale of alcohol to a minor. *Id.*

48. *Id.* at 509-10.

49. *Id.* at 512-13.

50. *Matthews*, 527 A.2d at 513.

51. 18 PA. CONS. STAT. ANN. § 6308 (Supp. 1993). Section 6308(a) of the Crimes Code states:

> A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or knowingly and intentionally transports any liquor or malt or brewed beverages . . . .

Id. Liability on the part of the supplier is found through accomplice culpability in 18 PA. CONS. STAT. ANN. § 306 (1983). Section 306 of the Crimes Code states in pertinent part:

> (a) General Rule.--A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
>
> (b) Conduct of another.--A person is legally accountable for the conduct of another person when:

In *Matthews*, the Supreme Court relied upon its prior reasoning in *Congini v. Portersville Valve Co.*[53] In *Congini*, a social host was found negligent per se for serving a minor in violation of section 6308 of the Crimes Code[54] where the minor wrecked his car while driving home from the company Christmas party.[55] The court found the defendant-employer liable for the injuries proximately resulting from the minor's intoxication. It was acknowledged by the court that it was departing from established law for social hosts which found no liability for injuries resulting from the service of intoxicants to guests.[56]

The court found that in enacting the Crimes Code the legislature determined that persons under the age of twenty-one are incompetent to handle alcohol. Therefore, a social host who serves a minor alcohol breaches a statutory duty and is negligent per se. It was the legislative intent that liability be imposed on anyone who serves a minor, where such service results in injuries.[57]

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(1) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;

(2) he is made accountable for the conduct of such other person by this title or by the law defining the offense; or

(3) he is an accomplice of such other person in the commission of the offense.

(c) Accomplice defined.--A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

(2) his conduct is expressly declared by law to establish his complicity.

§ 306(a), (b) and (c).

52. *Matthews*, 527 A.2d at 512 & n.4. The court notes that the intention of the General Assembly in prohibiting the sale of alcohol to minors is to protect both minors and the public at large. *Id.* at 511.

53. 470 A.2d 515 (Pa. 1983). The *Matthews* court also affirmed *Congini*'s holding the same day it decided *Matthews*. In Orner v. Mallick 527 A.2d 521 (Pa. 1987), the court held that serving alcohol to any minor was a breach of duty. *Matthews* 527 A.2d at 510.

54. For the text of section 6308 *see supra* note 51.

55. *Congini*, 470 A.2d at 516.

56. *Id.* at 517. *See supra* note 11 for common law social host liability.

57. *Id.* at 517-18. This thinking has been expanded subsequently. *See, e.g.*, Orner v. Mallick, 527 A.2d 521, 524 (Pa. 1987) (holding that a social host is negligent per se for serving "any" alcohol to a minor, "not just an amount sufficient to intoxicate the minor."); Herr v. Booten, 580 A.2d 1115 (Pa. Super. Ct. 1990) (student for whom roommates purchased alcohol on day before birthday was not considered twenty-one for purposes of section 6308 of the Crimes Code and therefore roommates were negligent per se); McGaha v. Matter, 528 A.2d 988 (Pa. Super. Ct. 1987) (The Superior Court, in applying *Matthews*, ruled that the trial court erred in determining that the plaintiff had no cause of action where complaint failed to aver that minor was visibly drunk when he purchased alcohol.).

In *Matthews*, the court determined that what is true for a social host is also true for a licensee under the Liquor Code.[58] Serving alcohol to a minor constitutes a breach of duty whether it is done by a social host or by a licensee.[59] According to the Pennsylvania Supreme Court, the Crimes Code manifests a clear legislative intent to protect minors and the general public from the detrimental effects of a minor's consumption of alcohol.[60] The violation of the Crimes Code by a licensee is negligence per se[61] and upon a finding that a minor was served intoxicating liquor, the licensee involved is liable for injuries proximately caused by the minor's intoxication.[62]

Despite the passage of section 4-497 of the Liquor Code, negligence per se is found where a licensee serves an unintoxicated minor.[63] The court reasoned around the statute[64] and with this reasoning the traditional rule regarding contributory negligence also changed.

D. Comparative Negligence Implications

The court in *Congini* stated that a social host could assert the minor's comparative negligence as a defense.[65] The court stated that a cause of action in tort exists for an injured minor or a third party against a social host who violates the Crimes Code by serving the minor intoxicants. The court also reasoned that a social host may assert a minor's contributory negligence as an affirmative defense.[66] The court went on to state that under Pennsylvania's Comparative Negligent Act,[67]

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58. *Matthews*, 527 A.2d at 511.

59. *Id.*

60. *Id.* at 511 (citing *Congini*, 470 A.2d at 518).

61. *Matthews*, 527 A.2d at 511; *Congini*, 470 A.2d at 518.

62. *Matthews*, 527 A.2d at 511; *Congini*, 470 A.2d at 518. *See also* cases cited in *supra* note 57.

63. *See supra* note 46 for evaluation of this finding.

64. *See supra* notes 38-64 and accompanying text.

65. *Congini*, 470 A.2d at 518.

66. *Id.* "[A]lthough we recognize that an eighteen year old minor may state a cause of action against an adult social host who has knowingly served him intoxicants, the social host in turn may assert as a defense the minor's 'contributory' negligence." *Id.*

67. 42 PA. CONS. STAT. ANN. § 7102 (1981). Section 7102 states in pertinent part:

> (a) General rule.--In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.
>
> (b) Recovery against joint defendant; contribution.--Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the

the fact finder must resolve whether the defendant's negligence was sufficient to allow recovery.[68]

Not surprisingly, the reasoning in *Congini* regarding social hosts was adopted for commercial vendors as well. In *Matthews*, the Supreme Court held that the liability found was not absolute or irrebuttable, but that the defendant could attempt to establish the comparative negligence of the actors involved.[69]

The court directly confronted the issue of comparative negligence in *Barrie v. Pennsylvania Liquor Control Bd.*[70] The *Barrie* court affirmed the common pleas court's decision allowing the licensee to assert the defense of the comparative negligence on the part of the minor injured plaintiff.[71] In *Barrie*, a mother sued several defendants who were involved with her minor son's consumption of alcohol on the night her son drowned. One defendant, the state liquor store, had sold alcohol to the deceased's friend who was also a minor.[72] The trial court applied comparative negligence principles and found in favor of all of the defendants.[73]

On appeal, the Commonwealth Court dismissed the plaintiff's assertion that *Majors* and *Schelin* controlled.[74] Rather, the court maintained that the case was controlled by *Matthews* and *Congini*.[75] The court attempted to distinguish *Majors* and *Schelin* by stating that those decisions did not hold the licensee strictly liable, but were actually drawing an inference that the illegal service was a substantial cause of the injury.[76] The court concluded that it would be a nearly insurmountable burden for the plaintiff to have to prove which drink caused the harm.[77]

Furthermore, the court reasoned that the cases of *Majors* and *Schelin*, which had applied the Restatement (Second) of Torts section 483

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total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

§ 7102(a) and (b). For discussion of this statute see *infra* note 78.

68. *Congini*, 470 A.2d at 518-19.
69. *Matthews*, 527 A.2d at 512.
70. 586 A.2d 1017 (Pa. Commw. Ct. 1991).
71. *Id.* at 1019-20.
72. *Id.* at 1018.
73. *Id.* at 1019.
74. *Id.* at 1020.
75. Barrie v. Pennsylvania Liquor Control Bd., 586 A.2d 1017, 1020 (Pa. Commw. Ct. 1991).
76. *Id.*
77. *Id.*

and had disallowed the defense of contributory negligence to licensees, were decided *prior* to the adoption of comparative negligence in Pennsylvania.[78] The defense of contributory negligence completely barred the plaintiff from recovery. Under the comparative negligence defense, however, negligence and liability are apportioned according to relative fault. Therefore, the comparative negligence defense is not a complete bar to the plaintiff's recovery.[79]

Therefore, the court concluded that, rather than establishing absolute liability, the *Majors* and *Schelin* decisions disallowed the contributory negligence defense based on a desire to allow the plaintiff to recover.[80] The implication from *Matthews* and *Congini* is that the adoption of comparative negligence in Pennsylvania compels a different result, for example, admission of evidence of the plaintiff's own negligence.[81]

III. The Inconsistency

The current situation is inconsistent. If a tavern violates section 4-493(1) of the Liquor Code by serving a minor, it is deemed negligent per se and is liable for injuries sustained by the minor or a third party proximately caused by the minor's consumption.[82] The tavern may, however, assert the comparative negligence of the minor and its liability may be limited accordingly.[83] A tavern which violates section 4-493(1) of the Liquor Code by serving a visibly intoxicated customer is also deemed to be negligent per se and liable for injuries sustained by the patron's intoxication.[84] Nevertheless, the Pennsylvania courts have not

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78. *Id.* Comparative negligence was adopted by the Pennsylvania legislature in 1976. Act of July 9, 1976, No. 152, 1976 Pa. Laws 855 (codified as amended at 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1993). For text of section 7102 *see supra* note 67. This is a departure from the previous law of contributory negligence which served as a complete bar to a plaintiff's claim. If a defendant could assert the negligence of the plaintiff, no matter how slight or minor in relation to the defendant's negligence in bringing about the resulting injury, the plaintiff would be unable to recover at all. The harshness of this rule precipitated the adoption by most jurisdictions of comparative negligence in varying degrees. For a complete discussion of contributory/comparative negligence see Keeton, *supra* note 13, § 65, at 461.

Pennsylvania's comparative negligence law allows a plaintiff to recover as long as their negligence is not greater than the defendant(s). The defendant(s) are only liable for that percentage of the damages which they were negligent as to the plaintiff and other defendants. 42 PA. CONS. STAT. ANN § 7102 (1982 & Supp. 1993).

79. *See* 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1993).

80. *Barrie*, 586 A.2d at 1020.

81. *Id.*

82. *See supra* notes 38-64 and accompanying text. Liability here is also found under the Crimes Code. *See supra* note 51. The violation is found to be negligence per se.

83. *See supra* notes 65-81 and accompanying text.

84. *See supra* notes 7-24 and accompanying text.

allowed licensees to assert the defense of comparative negligence when their negligence per se is the service of alcohol to a visibly intoxicated patron.[85]

This inconsistency is inappropriate; licensees should be permitted to assert the defense of comparative negligence regardless of the status of the individual to whom intoxicating beverages are served. This change must take place for reasons of judicial integrity and social policy. This change is logical because comparative negligence is not a complete bar to plaintiff's claim and because it is questionable whether section 4-493(1) should be considered an exceptional statute.

A. Judicial Integrity

Judicial integrity is a very important concept in Pennsylvania law.[86] This doctrine requires that courts be predictable and that when confronted with the same fact scenarios, all courts will reach the same outcome.[87] Courts should not apply the same law differently.

In dram shop suits, violations of "exceptional statutes," which are enacted to protect special classes of individuals,[88] are accorded dissimilar treatment. The courts have determined that when a licensee violates the laws of Pennsylvania by serving a minor or a visibly intoxicated customer, he or she is negligent per se.[89] The courts have further determined that these prohibitions were enacted by the General Assembly to protect the intoxicated patron or the minor and the public at large.[90] In *Majors* and *Schelin* the courts impliedly determined that these provisions met the Restatement's definition of "exceptional statute" and therefore did not allow the defendants to invoke the defense of

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85. As noted earlier, the court in Neal v. Sunset Grove Inc., 1 Pa. D. & C.4th 294 (1988), confronted the issue of whether or not to allow the defense of contributory negligence to a tavern which had served a visibly intoxicated adult. The case came after the adoption of comparative negligence. The *Neal* court held that *Majors* and *Schelin* controlled and therefore did not allow the tavern to assert this defense. *Id.* at 296-97.

86. This can be seen through Pennsylvania cases upholding the doctrine of *stare decisis*. *See* Monongahela Street Ry. v. Philadelphia Co., 39 A.2d 909, 915-16 (Pa. 1944), and cases cited therein.

87. *See* Yudacufski v. Commonwealth of Pa. Dep't of Transp., 454 A.2d 923, 926-27 (Pa. 1982).

88. *See* RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965).

89. *See supra* notes 7-24, 38-64 and accompanying text. Negligence per se for the service of alcohol to visibly intoxicated adults is found solely on the violation of section 4-493(1) of the Liquor Code. Negligence per se for the service of alcohol to minors is found both through the Liquor Code and the Crimes Code. *See* PA. STAT. ANN. tit. 47, § 4-493(1) and 18 PA. CONS. STAT. ANN. §§ 306 and 6308.

90. *See Majors*, 205 A.2d at 875-76; *Matthews*, 527 A.2d at 511.

contributory negligence.[91] However, in *Matthews* and *Barrie* the courts did not apply the "exceptional statute" exception and allowed the licensees to assert the affirmative defense of comparative negligence.[92] This outcome is inconsistent and the different application of the same law violates judicial integrity. This inconsistency must be remedied. The Pennsylvania courts should adopt comparative negligence as a defense available to licensees when sued by a patron or third party injured as a result of the licensee serving the patron while he or she was visibly intoxicated.

B. Public Policy

Public policy also dictates that licensees should be permitted to assert the defense of comparative negligence. It is in society's best interest that persons be held responsible for their own actions.[93] People who drink to the point of intoxication should not be absolved completely from the consequences of their actions. Moreover, such individuals certainly should not be able to have their injuries completely compensated. The failure to hold people responsible for their own actions when such actions cause injuries to themselves or others effectively condones the activity.

Pennsylvania courts have previously recognized the importance of this social policy. In *Orner V. Mallick*[94] the Pennsylvania Supreme Court acknowledged its departure from the "great weight of authority in the United States" which it had previously followed[95] regarding social host liability.[96] The *Orner* court stated that under *Congini* this abandonment of prior law was proper for minors.[97] The court recognized that the legislature was seeking to protect minors from their

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91. *See supra* notes 25-33 and accompanying text. Lower courts have followed and not permitted defendants to assert the defense of comparative negligence. *See* Neal v. Sunset Grove Inc., 1 Pa. D. & C.4th 294 (1988).

92. *See supra* notes 69-78 and accompanying text.

93. Some may argue that in the case of innocent third parties, it is unfair to apportion damages where the defendant who was intoxicated is insolvent and the defendant tavern has the "deep pocket." Under Pennsylvania's comparative negligence statute, however, a plaintiff will still be fully compensated in this case. The statute specifically states that in the situation of joint defendants, a plaintiff may recover his or her full damages from any one defendant and that defendant must seek contribution from the other(s). 47 PA. CONS. STAT. ANN. § 7102(b) (1982). For text *see supra* note 67.

94. 527 A.2d 521 (Pa. 1987).

95. *See* Klein v. Raysinger, 470 A.2d 507 (Pa. 1983) (refusing to hold social host liable for injuries resulting from intoxication of guests).

96. *Id.* at 523.

97. *Id.*

own indiscretion.[98] Still, the court concluded, the reasoning under the common law which did not find liability for social hosts' furnishing liquor to guests was sound. The court stated that:

> The consequences of accepting intoxicants were left to the personal responsibility of the guest, and the host was not required to answer for their effect. The adult . . . who drank more than he should answered alone to himself and to all others for whatever injury followed his acceptance of intoxicants.[99]

Although licensees are governed by the Liquor Code, individuals must be held responsible for their own conduct.

Other jurisdictions have also cited personal responsibility as a reason for allowing the defense of comparative negligence. In *Del E. Webb Corp. v. Superior Court of Arizona*[100] the Supreme Court of Arizona held that society's interest in holding one personally responsible for drinking to the point of intoxication was one reason for allowing defendant taverns the defense of comparative negligence.[101] The court cites *Congini* as support for this proposition, stating that it is in the best interest of the public that most people be held responsible for their conduct.[102] The court further limits its holding to the service of alcohol to intoxicated adults.[103]

In *Lee v. Kiku Restaurant*[104] the Supreme Court of New Jersey further espoused personal responsibility as a reason to allow a defendant the defense of comparative negligence. The court stated that in allowing taverns the defense of comparative negligence it was "strongly influenced" by the public interest in deterring those who would create a risk to others by voluntarily drinking to the point of intoxication.[105] The court recounted that the laws of New Jersey show that those who willingly become intoxicated must be responsible for their own conduct.[106]

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98. *Id.*
99. *Id.*
100. 726 P.2d 580 (Ariz. 1986) (en banc).
101. *Id.* at 586.
102. *Id.*
103. *Id.* The court did not reach the issue of whether the comparative negligence defense would be applicable to cases where a minor is served. *Id.* n.8.
104. 603 A.2d 503 (N.J. 1992).
105. *Id.* at 509.
106. *Id.* The court cited to its statutes and cases regarding New Jersey's drunk driving laws. *Id.*

This "personal responsibility" rationale was also applied by the Colorado Supreme Court in *Lyons v. Nasby*.[107] The court stated that one who voluntarily drinks to the point of intoxication should at least be partially responsible for their injuries.[108] The court went on to state that to prevent a tavern from demonstrating comparative negliegnce on the part of the plaintiff would be a departure from traditional tort principles.[109] Many jurisdictions, therefore, have accepted the public policy rationale of holding one responsible for one's own actions in justifying the application of the comparative negligence defense.

IV. The Logical Justifications for Permitting the Use of Comparative Negligence in Dram Shop Suits

A. The Comparative/Contributory Distinction

One argument in favor of allowing the use of the comparative negligence defense by licensees sued under a theory of negligence per se is based upon the distinction between contributory negligence and comparative negligence.[110] Such a distinction has been espoused by the Pennsylvania courts in decisions which permit a licensee to assert the defense of comparative negligence when a minor was served and consequently injured himself or herself or a third party.[111] It would be consistent for the courts to apply this reasoning in cases involving the service of alcohol to a visibly intoxicated customer.[112]

In *Matthews*, the court did not specifically address why the defense of comparative negligence would be available to the licensee. The court simply cited *Congini* and stated that a commercial licensee's liability to a third party for damages proximately caused by the service of alcohol was not absolute or irrebuttable.[113] Therefore, the court permitted the licensee to assert the comparative negligence of the actor(s) involved.[114]

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107. 770 P.2d 1250 (Colo. 1989) (en banc).

108. *Id.* at 1255.

109. *Id.* at 1259.

110. For a discussion of Pennsylvania's change to comparative negligence and the text of its comparative negligence statute see *supra* notes 67, 78.

111. *See supra* notes 65-81 and accompanying text.

112. In *Neal*, *see supra* notes 34-36, the court of common pleas did not follow the reasoning applied in *Matthews* and *Barrie* (*see supra* notes 69-81 and accompanying text) despite the fact that it was decided after the passage of comparative negligence in Pennsylvania.

113. *Matthews*, 527 A.2d at 512.

114. *Id.*

When the common pleas court in *Barrie* confronted the issue of comparative negligence,[115] it drew an inference from *Matthews*.[116] In *Barrie* the defendant attempted to assert the comparative negligence of the plaintiff (a minor) who died after drinking with a minor to whom the defendant had sold alcohol.[117] The court stated that although not addressed specifically in *Matthews* or *Congini*, it is implied that the enactment of comparative negligence compelled a different result than that found in *Majors* and *Schelin*.[118] The court further reasoned that the *Majors* and *Schelin* decisions, which barred the contributory negligence defense, were based primarily, if not solely, on the fact that permitting the defense would act as a complete bar to the action.[119] In such a case, the court reasoned, the duty imposed by section 4-493(1) of the Liquor Code would become illusory.[120] Because comparative negligence does not act as a complete bar to a plaintiff's claim, complete loss of a claim is no longer a problem and the court concluded that a different result was needed.[121]

In affirming the court of common pleas' decision in *Barrie*, the commonwealth court agreed.[122] The court labeled *Matthews* and *Congini* as cases decided under the comparative negligence law while *Majors* and *Schelin* were decided under the old contributory negligence theory.[123] This distinction was paramount to the decision of the later courts in allowing licensees (and social hosts) the defense of comparative negligence.[124] The court concluded that the adoption of comparative negligence had changed the law regarding the availability of this defense to licensees where civil liability is alleged through the violation of the liquor laws.[125]

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115. Barrie v. Pennsylvania Liquor Control Bd., 5 D. & C.4th 174 (1990), *aff'd*, 586 A.2d 1017 (Pa. Commw. Ct. 1991).

116. *Id.* at 181.

117. *Id.* at 174-75, 178.

118. *Id.* at 181.

119. *Id.*

120. *Barrie*, 5 D. & C.4th at 181.

121. *Id.*

122. Barrie v. Pennsylvania Liquor Control Bd., 586 A.2d 1017 (Pa. Commw. Ct. 1991).

123. *Id.* at 1020.

124. *Id.* (citing Matthews v. Konieczny, 527 A.2d 508 (Pa. 1987) and Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983)).

125. *Id.* The court also stated that earlier decisions did not actually hold the licensee strictly liable. *Id.* The courts were really just drawing the inference that the illegal service was a substantial cause of the injury because it would be an impossible burden for the plaintiff to meet if he or she had to prove which drink served to the intoxicated individual caused the harm. *Id.*

It logically follows that the court should apply these same conclusions if confronted with a case in which the violation by the licensee was serving a visibly intoxicated customer. It is likely

Several jurisdictions which had held previously that the defense of contributory negligence was unavailable to servers of alcohol have allowed the defense of comparative negligence.[126] The adoption of comparative negligence by the state controlled this result. The rationale is that comparative negligence is not a complete bar to the plaintiff's claim and therefore does not nullify the liability of the server for their negligence. For example, California changed its law regarding allowable defenses in *Sagadin v. Ripper*.[127] The *Sagadin* court concluded that because of the adoption of comparative negligence, providers of alcohol should be permitted to assert the negligence of the plaintiff as a defense.[128] The court reasoned that defendants who have violated a statute intended to protect the plaintiff against his or her own negligence would not be completely absolved from liability under comparative negligence.[129] The servers of alcohol, the court concluded, were entitled to have the plaintiff's negligence apportioned under the principals of comparative negligence.[130]

Minnesota also began permitting commercial and social providers of alcohol to use the defense of comparative negligence even though it had not allowed the same defendants the defense of contributory negligence. The civil liability provision of Minnesota's dram shop statute is governed by the comparative negligence statute.[131] In

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that the Pennsylvania Supreme Court, when afforded the appropriate opportunity, will follow its decisions in *Matthews* and *Congini* and allow a tavern to assert the comparative negligence of an adult patron who was served while visibly intoxicated.

126. Not all jurisdictions discontinued the exceptional statute exception to contributory negligence with the adoption of comparative negligence. *See, e.g.*, Loeb v. Rasmussen, 822 P.2d 914, 917-19 (Alaska 1991) (court reverses jury's apportionment of damages stating that Alaska's codifying comparative negligence did not change the exceptional statute exception and therefore the court was unwilling to consider a minor's contributory negligence); Slager v. HWA Corp., 435 N.W.2d 349, 352-53 (Iowa 1989) (Supreme Court of Iowa affirms lower court's decision that defense of comparative fault does not apply in dram shop cases. The statute is intended to protect innocent citizens and if the legislature wanted comparative negligence to apply to dram shop cases, it could have stated so explicitly when adopting comparative negligence.)

127. 221 Cal. Rptr. 675 (Cal. Ct. App. 1985) (social host was found liable for injuries sustained as a result of serving a minor in violation of a statute).

128. *Id.* at 691-92.

129. *Id.* at 677-78, 687-93. The court waffled on whether or not the statute prohibiting the provision of alcohol to minors constituted an exceptional statute (one intended to protect the plaintiff from his own negligence). *See supra* note 25. Even if this statute falls into the category of exceptional statutes, the court concluded, the adoption of comparative negligence ended the need for the "special class exception" which does not allow the defendant the contributory negligence defense due to its complete bar on plaintiff's claim. *Id.* at 690-93. The court then added that plaintiff's contributory fault was always to be apportioned even in the case of exceptional statutes unless the legislature expressly states otherwise. *Id.* at 692-93.

130. *Id.* at 693-94.

131. *See* MINN. STAT. ANN. § 340A.801 (West 1990).

Danielson v. Johnson[132] the court of appeals of Minnesota affirmed the jury's allocation of fault based on the percentage of each party's negligence.[133] The court stated that it was proper to give to the jury the question of contributory negligence.[134]

New Jersey also began allowing taverns the defense of comparative negligence only after it had preempted its predecessor, contributory negligence. In *Lee v. Kiku Restaurant*[135] the New Jersey Supreme Court affirmed the appellate court's reversal of the trial court's verdict because the jury had not been instructed on comparative negligence.[136] In so doing, the Supreme Court of New Jersey specifically expanded on an earlier decision allowing a limited comparative negligence defense[137] and overturned an even earlier holding[138] which had prohibited the defendant from asserting the plaintiff's negligence as a defense.[139] This previous holding, the court reasoned, was adopted when contributory negligence was a complete bar to a plaintiff's recovery. The court concluded that it was now appropriate to allow the defendant to assert the comparative negligence defense since a plaintiff may recover even when he or she is also negligent.[140]

B. The "Exceptional Statute" Finding

Courts in other jurisdictions have found that dram shop statutes do not meet the criteria of an "exceptional statute."[141] Therefore, the "exceptional statute" exception which does not allow defendants to assert the defense of contributory negligence should not be a factor in dram shop suits. This is especially true in relation to intoxicated patrons.[142]

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132. 366 N.W.2d 309 (Minn. Ct. App. 1985).

133. *Id.* at 313-14.

134. *Id.* at 313.

135. 603 A.2d 503 (N.J. 1992).

136. *Id.* at 511.

137. Buckley v. Estate of Pirolo, 500 A.2d 703 (N.J. 1985). *Buckley* held that a tavern could reduce its liability upon demonstrating that the plaintiff had the capacity to appreciate the risk of engaging in the activity which led to the plaintiff's injuries. *Lee*, 603 A.2d at 507. The tavern could not, however, assert the defense of comparative negligence where it had served a visibly intoxicated patron and as a result of his intoxicated state the patron could not take self-protective measures. *Id.*

138. Soronen v. Olde Milford Inn, Inc., 218 A.2d 630 (N.J. 1966) (superseded by statute as stated in Tose v. Greater Bay Hotel and Casino Inc., 819 F. Supp. 1312 (D.N.J. 1993)).

139. *Lee*, 603 A.2d at 509-11.

140. *Id.*

141. For discussion on "exceptional statutes" see *supra* note 30.

142. Some jurisdictions with dram shop acts which hold taverns strictly liable do not allow an action by a patron who drinks to the point of intoxication and becomes injured. *See, e.g.*, Weeks v. Princeton's, 570 So. 2d 1232, 1233 (Ala. 1990); Jodelis v. Harris, 517 N.E.2d 1055, 1058 (Ill.

Arizona disposed of the "exceptional statute" argument in dram shop cases in *Del E. Webb Corp. v. Superior Court of Arizona*.[143] The *Webb* court allowed the defendant to raise the defenses of contributory negligence and assumption of the risk.[144] The court refused to term the state's dram shop statute "exceptional."[145] The court refused to give "exceptional statute" status to the statute because no clear legislative intent to bar these defenses existed. The court concluded that courts should not bar these defenses absent clear legislative intent to the contrary.[146]

The court gave four additional reasons why they would not term their dram shop statute "exceptional." First, a statute prohibiting the sale of alcohol to intoxicated patrons and minors appears to be primarily intended to protect the general public.[147] Second, it is not in the public's best interest to impose absolute liability where no liability previously existed for selling liquor to "an able bodied person."[148] Third, the adoption of comparative negligence now prohibits the action from becoming barred so there can be no imposition of absolute liability anyway.[149] Fourth, it is good judicial policy to preserve defenses in dram shop actions.[150] The court here cites *Congini* and states that the interests of the public are best served by the common law principals that make most people responsible for their own conduct.[151]

V. Conclusion

Under Pennsylvania dram shop law a licensee can be held liable for injuries caused by violation of section 4-493(1) of the Liquor Code.[152] This liability is termed absolute.[153] Therefore, a plaintiff is only required to prove that the licensee violated section 4-493(1) and that this violation caused the plaintiff's damages.

There is an inconsistency in this dram shop law regarding available defenses. When a licensee's violation consists of serving a visibly intoxicated customer, the licensee is not permitted to assert the

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1987); Ciemierek v. Jim's Garage, 282 N.W.2d 396, 398 (Mich. Ct. App. 1979).

143. 726 P.2d 580 (Ariz. 1986).
144. *See id.* at 587.
145. *Id.* at 583-84.
146. *Id.* at 584.
147. *Id.* at 585.
148. Del E. Webb Corp. v. Superior Court of Arizona, 726 P.2d 580, 585 (Ariz. 1986).
149. *Id.* at 586.
150. *Id.*
151. *Id.* These are all reasons Pennsylvania courts should consider.
152. *See supra* notes 7-24 and accompanying text.
153. *See supra* note 14 and accompanying text.

comparative negligence defense.[154] However, when the tavern's violation is serving a minor, the licensee is permitted to assert the defense of comparative negligence.[155]

This inconsistency is untenable. First, it violates judicial integrity.[156] Pennsylvania should follow its own precedent regarding the defense of comparative negligence in cases in which the tavern served a minor. The same reasons for allowing taverns the comparative negligence defense when they have served a minor mandate a change in the law regarding cases in which a tavern served a visibly intoxicated customer. Second, it is in society's interest for people to be responsible for their own actions.[157] When patrons drink themselves to the point of intoxication, they should not be absolved from liability for their acts which injure others.

Third, the Pennsylvania courts gave the distinction between contributory negligence and comparative negligence as a reason for allowing taverns to assert the defense of comparative negligence.[158] Contributory negligence had completely barred a plaintiff from recovery. Comparative negligence merely limits recovery according to relevant fault.[159] Therefore, a different result is compelled now that comparative negligence has been adopted by the legislature. It is important to note that other jurisdictions began allowing taverns to assert the comparative negligence of the minor or a visibly intoxicated customer after the state changed from contributory negligence to comparative negligence.[160]

Finally, it is questionable whether or not section 4-493(1) is an "exceptional statute." An "exceptional statute" is one which is intended to protect a certain class of persons from themselves.[161] Pennsylvania termed section 4-493(1) of the Liquor Code an "exceptional statute."[162] The courts found that the legislature intended the statute to protect visibly intoxicated patrons and minors from themselves.[163] As other jurisdictions have found, it seems more likely that dram shop acts were

154. *See supra* notes 7-37 and accompanying text.
155. *See supra* notes 38-81 and accompanying text.
156. *See supra* notes 86, 87 and accompanying text.
157. *See supra* notes 94-110 and accompanying text.
158. *See supra* notes 38-64 and accompanying text.
159. *See supra* notes 110-140 and accompanying text.
160. *See supra* notes 126-140 and accompanying text.
161. *See supra* note 25 and accompanying text.
162. *See supra* notes 25-33 and accompanying text.
163. *See supra* notes 25-33 and accompanying text.

intended to protect society from the intoxicated individual.[164] It also seems more likely that the legislature would have intended to protect the minor from his or her own impropriety than the adult from his or her own impropriety.

The Pennsylvania Supreme Court has not yet confronted the issue of the availability of the *comparative* negligence defense in dram shop suits where the tavern violated the Liquor Code by serving a visibly intoxicated customer.[165] It may be that when the appropriate case does come before the Supreme Court, or the Superior Court, the defense will be allowed.[166] The Pennsylvania courts should follow their own decisions in cases where a tavern has served a minor. The courts of Pennsylvania should allow taverns to assert the comparative negligence defense in all suits brought under section 4-493(1) of the Liquor Code.

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164. *See supra* note 148 and accompanying text.

165. The Supreme Court cases which did not allow contributory negligence were decided prior to the adoption of comparative negligence. *See, e.g.*, Majors v. Brodhead Hotel, 205 A.2d 873 (Pa. 1965). Neal v. Sunset Grove Inc., 1 Pa. D. & C.4th 294 (1988) was decided after the adoption of comparative negligence but was heard in the court of common pleas.

166. The appropriate case would require the right fact scenario and a defendant willing to appeal a lower court's order not allowing the defendant to assert the defense of comparative negligence.